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Transnational Legal Practice and Professional Ideology

Bryant G. Garth*

The chemical disaster of the Union Carbide plant in Bhopal dramatically poses some of the issues involved in transnational legal practice. The story begins with a multinational corporation providing a desired American product to a third world country. When the disaster occurs, the same army of lawyers that would be unleashed in the United States travels to India to make the company pay and to enrich themselves through the sale of their services to the injured. The lawyers race back to the United States and file multimillion dollar lawsuits. For many commentators and editorial writers this profit-oriented revelry in a horrible international disaster represents a national embarrassment.¹ One cartoon shows vulture lawyers arriving “to help,” prompting a local resident to exclaim, “Run—It’s another gas attack!”² What is difficult to explain is why this scene has prompted as much or more concern than the original disaster, itself a product of profit-oriented technology exported abroad.

The articulated criticisms provide a place to begin. The ethics of the lawyers who traveled to India attracted special condemnation. They allegedly solicited clients in a “non-professional” manner, rounding up individuals who, in many cases, probably had no idea of the consequences of the papers they were asked to sign.³ Yet such mass solicitation is hardly shocking to the American public. The Supreme Court has sanctioned it in certain circumstances, and the guidelines for line drawing suggested by the Court do not provide a firm basis to condemn the

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1. See, e.g., *Bhopal: Battling For Business*, Newsweek, Feb. 4, 1985, at 81. For an Indian perspective, see *The Legal Damage*, India Today, Jan. 15, 1985, at 60 (“The stress has been on collecting as many signatures as possible.” *Id.* at 61).

2. Cartoon by Oliphant, © 1984 Universal Press Syndicate, released Dec. 11, 1984.

3. See *The Legal Damage*, *supra* note 1, at 61.

conduct of the lawyers in Bhopal.⁴ It will suffice to note that the popular press paid little attention to how lawyers approached the victims of other recent disasters such as the collapse of the Hyatt Regency skywalks in Kansas City.⁵

Perhaps, then, what really troubles us is the specter of an American invasion of another community—the introduction of American values and methods for coping with disaster to another society. But what values were brought by the U.S. lawyers? Is it wrong to seek compensation for personal injury—to make a company pay for its mistakes so that they will not be repeated if they are avoidable at a reasonable cost? It is not as if India is a country notably hostile to litigation.⁶ Furthermore, we are not troubled when national personal injury lawyers invade the scene of domestic disasters; sometimes we even celebrate the skills and expertise of these proven litigators. In any event, values come with all goods and services, whether blue jeans or, more to the point, chemical pesticides that favor a certain kind of capital-intensive agriculture. Moreover, if India found the values introduced by certain services and goods inconsistent with important public values, it could take steps to prevent their importation.

If it is not the introduction of American values to a foreign culture that bothers us, perhaps it is that the U.S. lawyers moved the case away from the one place—India—where local values could operate. Again, however, responses are not difficult to find. First, choice of law principles and legal doctrines such as *forum non conveniens* are designed to cope with this problem. Second, India has the ability to influence the choice of forum, and has indeed elected to pursue the matter in the courts of the United States. And third, U.S. courts may be “better” for this kind of litigation. According to one lawyer, “We have a highly developed legal system, and just as we export our high tech and agricultural prowess, there’s nothing wrong if we export our legal prowess.”⁷ Another noted, “I don’t see how the Indian system could handle the dispensing of justice for all these cases.”⁸

4. The line between protected solicitation, *In re Primus*, 436 U.S. 412 (1978), and unprotected solicitation, *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978), is vague enough to provide arguments in favor of fairly aggressive tactics. The finding of a protected status may turn on the “public interest” motives behind particular solicitation tactics balanced against the harm thought to arise from those tactics. Certainly some of the reported conduct in Bhopal transgressed current professional standards, but the general analysis provides little guidance for determining which of those activities merits condemnation. The most recent Supreme Court pronouncement is rather unhelpful: “[R]ules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible.” *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2275 (1985) (citations omitted).

5. A discussion of the practices of these lawyers can be found in Student Project, *A Case Study in Mass Disaster Litigation*, 52 UMKC L. REV. 151, 193–94 (1984).

6. See Galanter, *Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy*, 20 TEX. INT’L L.J. 273, 274–75 (1985); Galanter, *Making Law Work for the Oppressed*, 3 THE OTHER SIDE, Mar. 1983, at 7.

7. Riley, *U.S. Lawyers Court Disaster in Bhopal*, NAT’L L.J., Jan. 7, 1985, at 3, 6 (quoting David Marion).

8. *Id.* (quoting Richard Brown).

Again, these are familiar assertions as regards the domestic scene in the United States. They represent precisely the arguments of the non-local counsel in the Hyatt Regency litigation⁹ who wanted to handle all the cases via a federal class action instead of through the Missouri state courts.

Finally, we face the accusation that American lawyers are representing foreigners against a U.S. corporation. Perhaps this is unpatriotic or even disloyal. But is there anything about transnational litigation that vitiates the usual assumption that if lawyers zealously represent their clients, whoever they may be, the legal system will produce an appropriate outcome? Should it matter that a lawyer's practice is not confined to domestic problems, domestic clients, and domestic courts? Or that the damage awards that a company like Union Carbide might be made to pay will be sent to another country and thus exacerbate our balance of payments problem? Or that victims may end up being compensated much more for their injuries than they ever would have been in their own legal culture?

The preceding discussion suggests that public uneasiness might be misplaced—that the Bhopal litigation might be no more than business as usual with the added element of foreign involvement. What is it about that foreign involvement that makes us see the situation differently? Specifically, it is appropriate to ask what makes the phenomenon of transnational legal practice worth examining in this volume of the Michigan Yearbook of International Legal Studies. One might simply state that world commerce is increasing, and naturally lawyers follow and facilitate that commerce. Study of the subject would then be little different from a discussion of transnational banking or accounting. It would be worth examining only to help practitioners adjust to this dimension of their trade and to attack barriers that impede the further expansion of legal business.

This essay assumes that there are three other reasons for studying transnational legal practice. First, such a study provides a way to explore some of the dilemmas that we often overlook about our domestic legal system. In both the domestic and transnational legal settings we are uncomfortable with the idea of law as “merely a business”; troubled by the invasion of “legality” into domains that once had seemed immune from state regulation; wary of the expense of “mega” law and litigation; reticent about a “total justice” which is expected to compensate individual victims of every unpleasant social accident;¹⁰ and nervous about the “adversary system excuse” for taking positions with serious political implications.¹¹ The Bhopal incident raises all these issues in a particularly remarkable setting. U.S. lawyers can to some extent “answer” the various concerns with responses

9. See Gordon, *The Optimum Management of the Skywalks Mass Disaster Litigation by Use of the Federal Mandatory Class Action Device*, 52 UMKC L. REV. 215 (1984).

10. See, e.g., L. FRIEDMAN, *TOTAL JUSTICE* (1985); INS. INFORMATION INST., *THE CIVIL JUSTICE CRISIS* (1984).

11. See, e.g., Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 83 (D. Luban ed. 1984).

taken from domestic legal practice. However, suggestions that the Bhopal affair represents the status quo in U.S. lawyering are unlikely to placate most critics.

Second, a study of this type provides an opportunity to examine the ideology that is part of transnational legal practice, and to make explicit the values underlying that ideology even if, for many, those values seem free of controversy. The expansion of transnational legal practice is introducing a particular type of service to new places and transactions. We must recognize that a form of legal practice—like jeans or pesticides—embodies values and ideals that may not be desirable in every society. During the “law-and-development movement” of the 1960s, we in the United States sought to export our legal system as a means to democracy and development in other countries.¹² Although that movement fell out of fashion, we may be seeing a similar phenomenon quietly emerging through the international market for U.S. legal services. Only if we uncover the values behind this new practice will we be able to determine its probable influence on other countries.

Finally, the study of transnational legal practice and the ideology underlying it will increase our understanding of ourselves as members of a professional elite. Transnational practice can be viewed as a new challenge to an embattled domestic profession. But it also represents an opportunity to strengthen the legitimacy of the profession, to preserve a self-image that encompasses more than the selling of services to the highest bidder, whether that be General Motors or Muammar el-Qaddafi.¹³ This concern with maintaining a professional self-image helps to account for the role of the legal profession in the provision of services for the poor domestically and, of more concern in this article, the protection of international human rights abroad. The broad focus of the Michigan Yearbook provides an opportunity to examine how transnational business lawyering and international human-rights advocacy relate. My suggestion will be that one of the reasons for the recent boom in international human-rights advocacy is that it responds to the professional dilemmas highlighted by transnational legal practice.

The approach I will use to analyze transnational practice and its associated ideology is based largely on Robert Gordon's recent analyses of the legal profes-

12. For discussion of the law-and-development movement, see J. GARDNER, *LEGAL IMPERIALISM* (1980); Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); and Trubek & Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

13. It is interesting that in the competition to be selected for the executive committee overseeing the Bhopal litigation, the first speaker to address the judge insisted that “[g]reed is not, at this point in time, the big consideration pushing any of us.” Cates, *100 Lawyers Start the Legal Cleanup*, Nat’l L.J., Apr. 29, 1985, at 13 (quoting Jerry S. Cohen). The second lawyer then called on all counsel to work pro bono: “For counsel to be truly effective in representing the victim, the money issue must be buried once and for all.” *Id.* (quoting Stanley M. Rosenblatt).

sion in New York City during the late nineteenth century.¹⁴ His discussion of the relationship between changing methods of practice and the development of legal thought—"fantasies and practices"—offers a fruitful starting place for understanding the more recent history of the professional elite. Transnational legal practice represents a new dimension of practice with a corresponding impact on professional fantasies.

My examination of transnational legal practice begins by establishing the market setting. Market forces, after all, have generated the growth that has turned transnational legal practice into a significant dimension of elite professional life. The next section examines the self-image of the professional elite involved in transnational legal practice as well as the more general values created and promoted through such a practice. The third section scrutinizes the ideology of transnational practice—the controversy surrounding the values it represents and the serious dilemmas of transnational practice which it fails to resolve. The last section suggests that these dilemmas provide insight into the recent emphasis on human-rights advocacy among transnationally oriented lawyers.

I. UNDERSTANDING THE MARKET

A study of the ideological dimensions of transnational legal practice cannot neglect the market in which such services are offered.¹⁵ The practice of law is a protected business. In all countries, a monopoly of certain services has been won by some group of licensed legal professionals—or, as is the case in France, a range of licensed professionals.¹⁶ While the history of legal practice varies from country to country, we can generally point to a professional association that, at a minimum, has secured a monopoly to appear in designated courts. These associations may reinforce their monopolies by restricting entry into the profession, as is the case with the Continental notary¹⁷ and the Japanese bengoshi,¹⁸ or they may expand the services considered to be within the exclusive domain of their

14. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS* 51 (G. Gawalt ed. 1984). I have also drawn on an important but so far neglected article by A.A. Fatouros, *On the Hegemonic Role of International Functional Organization*, 23 *GER. Y.B. INT'L L.* 9 (1980).

15. According to Abel, "The composition and activities of capital and the state largely determine what lawyers do and how they do it, either directly or indirectly." Abel, *The Underdevelopment of Legal Professions: A Review Article on Third World Lawyers*, 1982 *A.B. FOUNDATION RESEARCH J.* 871, 878-79 (footnote omitted).

16. See, e.g., Tang Thi Thanh Trai Le, *The French Legal Profession: A Prisoner of Its Glorious Past?*, 15 *CORNELL INT'L L.J.* 63, 84-87 (1982).

17. For a description of the function of the notary in European countries, see R. SCHLESINGER, *COMPARATIVE LAW* 18-23, 334-35 (4th ed. 1980).

18. See Shapiro & Young, *The Role of Law and Lawyers in Japan and the United States*, in *ISSUES IN TRANSNATIONAL LEGAL PRACTICE*, 7 *MICH. Y.B. INT'L LEGAL STUD.* [TRANSNATIONAL PRACTICE] 25 (1985).

profession. German and U.S. bar associations have been particularly successful at preventing the practice of law by non-professionals.¹⁹ Not surprisingly, the countries with more open professions tend to be more willing to tolerate competition by legal professionals from other nations,²⁰ while the more "technically advanced" professionals—especially those from the United States—tend to be more anxious to compete in new markets.²¹

An increased demand by private business for lawyers versed in international trade and the argument that economic efficiency results from free trade in services have placed many of the formal organizations protecting legal monopolies on the defensive. Thus, for example, the elite Japanese *bengoshi*—who once confined their activities to advocacy and trial practice—have sought protection from U.S. penetration of the legal market in order to gain the time to develop the corporate legal skills demanded by "Japan, Inc."²² Even within the European Community, where there is a strong institutional commitment to free trade in services, national monopolies continue to dominate legal practice.²³

Private business is not the only source of demand for transnational lawyers. A number of nations anxious to increase trade and investment seek the assistance of foreign lawyers to fill a perceived gap in the domestic profession. Thus, for example, the People's Republic of China (P.R.C.)²⁴ and Oman,²⁵ both discussed in this volume, place few, if any, restrictions on the importation of legal talent. The perceived need is so great and the local profession so weak that protectionist concerns simply have not gained any force in those countries.

19. For the Federal Republic of Germany, see W. PFENNIGSTORF, *LEGAL EXPENSE INSURANCE* 41–44, 48–50 (1975). For the United States, see Note, *A Federal Bar for Foreign Lawyers*, in *TRANSNATIONAL PRACTICE* 129.

20. See, e.g., McHugo, *The Practice of Law by Foreign Lawyers in the Sultanate of Oman*, in *TRANSNATIONAL PRACTICE* 89.

21. Lawyers from the United States appear to have been the major beneficiaries, and, indeed, the current interest in the subject of transnational litigation derives especially from the increased demand worldwide for U.S. lawyers and their skills. The articles in this volume understandably reflect that concern and are in that sense somewhat biased. But it is a bias defensible in the same way that a decade ago a focus on transnational corporations could also concentrate on the United States. As a prominent Swedish lawyer noted in 1980, "there undoubtedly is a clear trend which favors American law firms as the winners in the race to conquer market shares of the world's legal business." Wetter, *The Case for International Law Schools and an International Legal Profession*, 29 *INT'L & COMP. L.Q.* 206, 212 (1980). Privately and publicly generated demand especially supports the growth of transnational legal practice according to the U.S. model.

22. See, e.g., Shapiro & Young, *supra* note 18, at 32.

23. See Note, *Obstacles to Implementation of the Liberalizing Principles of the Treaty of Rome*, in *TRANSNATIONAL PRACTICE* 113.

24. See Horsley, *Doing Business with the People's Republic of China: The Role of Foreign Lawyers*, in *TRANSNATIONAL PRACTICE* 63.

25. See McHugo, *supra* note 20.

II. LEGAL PRACTICE AND IDEOLOGY

Transnational legal practice serves both a narrow functional purpose—solving concrete problems for clients—and an ideological one. As Gordon writes, “[W]hat lawyers do should be examined as, among other things, the production of ideology.”²⁶ Legal services bring an ideological message for individual, domestic, and foreign consumption. The message strives to reconcile self-image, perceived public responsibility, and legal practice.

One lasting tenet of the legal profession reflected in the international bar is that it should be “independent,” especially independent from “public” or governmental control. Ms. Horsley’s examination of lawyering in the P.R.C. thus finds progress in new laws creating law firms that “will perhaps become more independent of government interests when providing services to foreigners.”²⁷ Lawyers should be free to take positions inconsistent with particular policies and priorities of their governments. Similarly, the work of lawyers is not supposed to be “political.” Still, it is always a little unclear just how much lawyers are supposed to be independent of their clients—private or governmental.

If legal practice is not to be political, the work of transnational lawyers must be grounded on another ethic. A professional commitment to “make deals” and “settle disputes” is one value on which transnational lawyers base their practice. Mr. Hertzfeld points out, for example, that “ideological differences, mistrust, and misunderstanding can interfere with the negotiating process if the lawyer is not quick to recognize and defuse such situations. In this regard, the lawyer’s talents not only as a draftsman but also as a diplomat are often called into play.”²⁸ Lawyers can help to minimize political, economic, and social conflicts that inhibit commercial agreements favorable to their clients. Lawyers are considered apolitical in the sense that they find a harmony of commercial interests that is beyond, or at least avoids, ideology.

A second set of values—the centerpiece of Max Weber’s account of the importance of the legal profession in Europe—includes stability and order.²⁹ Mr. McHugo notes the role of foreign lawyers in stabilizing commercial transactions.³⁰ In the P.R.C. there is a similar concern to give predictability to “extremely general” laws³¹ and to solve the problems of “inconsistency.”³² Here,

26. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70, 71–72 (G. Geison ed. 1983).

27. Horsley, *supra* note 24, at 76. Abel points out that “perhaps the most distinctive characteristic of Third World professions is the prominence of the public sector.” Abel, *supra* note 15, at 883.

28. Hertzfeld, *The Role of the Western Lawyer in East-West Transactions*, in *TRANSNATIONAL PRACTICE* 147, 162.

29. See 2 M. WEBER, *ECONOMY AND SOCIETY* 880–900 (G. Roth & C. Wittich eds. 1978).

30. See McHugo, *supra* note 20, at 97.

31. See Horsley, *supra* note 24, at 69.

32. *Id.* at 70.

too, a byproduct of independent advocacy of the interests of individual clients is deemed to be a transcendent public good.

In addition to settling conflicts, making deals, and promoting a certain rationality in the law, "independent" international advocates rely on certain "game rules." The background for making deals and settling disputes in transnational legal practice is supplied by an emerging law and custom with a substantive orientation.³³ One observer recently stated, "Businessmen, arbitrators, lawyers, and the other actors in the world of commerce and trade appear to have reached a common understanding as to the basic standards that should govern transactions of various types."³⁴ It is interesting that "Chinese lawyers and business personnel may look to foreign lawyers with whom they are negotiating for explanations of relevant international norms and practices."³⁵ The project is to teach a "neutral" body of laws necessary for all trading countries and businesses to master.

When breakdowns in the system do occur, the international actors prefer to fight with the best available technology, and for a variety of reasons that tends to mean "megalitigation" conducted in the United States. In no other country do the parties have such power—stemming especially from liberal discovery—to escalate a dispute into a tremendously costly lawsuit.³⁶ And in no other country can the diligent application of resources to a dispute uncover material that makes, for example, a simple breach of contract into a closer and much more complicated legal problem. A transcendent public good may be deemed to emerge from the zealous advocacy allowed in U.S. courts. Despite recent discussion of the efficiency of settlements, it can be suggested that the deterrent impact of large scale litigation helps to bolster the peaceful regime of international legality and access to the U.S. arsenal of weapons helps to maintain that stability.

Finally, transnational legal practice assumes an ideal of "internationalism" similar to that on which multinational corporations depend. Barnett and Muller's description of multinationals in the 1970s is instructive:

The heart of the legitimacy problem for the global corporation is the clash between global corporate loyalty and national law. Wherever global corporations encounter image crises, some local law or custom has usually been violated, at least in spirit, whether it be tax laws, currency-control laws, or some important tradition; e.g., the

33. See Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, in *TRANSNATIONAL PRACTICE* 182–83.

34. Wilner, *Acceptance of Arbitration by Developing Countries*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 283, 284 (T. Carbonneau ed. 1984).

35. Horsley, *supra* note 24, at 78.

36. For a comparative discussion of first-instance civil procedure, see Cappelletti & Garth, *A Comparative Conclusion*, in *CIVIL PROCEDURE*, 16 *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* 6-436 to 6-450 (1984). See also Note, *The Hague Convention on Taking Evidence Abroad: Conflict Over Pretrial Discovery*, in *TRANSNATIONAL PRACTICE* 291 (discussing one solution to conflicts between broad U.S. discovery rules and their narrower counter-parts in other regimes).

State Department, not ITT, is supposed to set foreign policy. It is evident that governments are losing control over important international transactions and that nominally private organizations are gaining control over such transactions. . . . Their justification for their power, as we have seen, is efficiency; "We can deliver" is their political slogan.³⁷

The clash between asserted domestic interests and the multinational businesses is avoided by an "international" ideology of free trade, minimal governmental regulation, and a common understanding of how conflicts ought normally to be resolved.

The transnational lawyer, acting consistently with this image, structures transactions to avoid governmental regulation and promote business profits. The working assumption is that everyone benefits from the business that this international orientation promotes. It may lead to activities that seem to be contrary to one country's interests—even the particular lawyer's home country's—but the long run interests of all are consistent with this orientation. Efficiency will triumph through the deals that the transnational lawyers structure, and, if necessary, enforce by recourse to the customs and norms of international business law which are themselves essentially fair and efficient and relatively autonomous from regulatory measures. This ideology is made explicit by organizations such as the Rule of Law Committee, whose goal "is to promote nondiscrimination with respect to foreign investment—that is, no discrimination based on nationality."³⁸ This working ideology reinforces the lawyer's ideal of professionalism and justifies assisting businesses to avoid local regulations that seem to have been adopted to further particular national interests. The ideology further suggests that it really does not matter whether a transnational lawyer promotes the interests of a foreign corporation—say a Japanese car dealer trying to increase imports into the United States—or a domestic corporation, since the goal is greater efficiency and stability through increasingly global trade. An analogy might be made to a lawyer in the United States, prior to the growth of the federal government, who promoted commerce among the states in part by avoiding restrictive state regulations. It would be easy to believe—at least before different federal policies emerged—that the overall national interest was strictly in maximizing economic growth. In

37. R. BARNET & R. MULLER, *GLOBAL REACH* 118 (1974). An example of the relationship of regulation to legal business is provided in an article on Miami lawyering:

Even such events as the financial crises in Latin America have been cited as a boon to international law practice. "The currency controls, in fact, generate legal business," says John T. Schriver, managing partner at the Miami office of Chicago's McDermott, Will & Emery. "Those restrictions force businessmen down there to look for new and innovative ways to invest their money."

Nelson, *Miami Law Practice Goes International*, *Legal Times*, Oct. 18, 1982, at 1, 8.

38. Pryor & Couric, *International Law Practice Thrives in Washington*, *Legal Times*, Aug. 11, 1980, at 32, 31.

the absence of accepted alternative international policies, the goal of world economic growth similarly serves to justify legal efforts to avoid "parochial" regulations.

III. PROBLEMS WITH THE IDEOLOGICAL STRUCTURE

This ideological position, while able to support much of transnational legal practice, confronts a number of difficulties. First, we can note that the ideal looks very much like a repackaged version of a product that failed to sell in the 1960s: "law and development."³⁹ The law-and-development movement used a U.S.-derived model of law and the legal profession to promote reform in the third world through foreign aid and assistance. The goal was to strengthen the rule of law in order to promote democracy and to further economic development: "legal development" would "foster a system of governance by universal, purposive rules, and would accordingly contribute to the enhancement of liberty, equality, participation, and rationality."⁴⁰ Typical favored projects involved reforms in legal education and the subsidization of legal services for the poor.⁴¹ These ethnocentric, though benevolent efforts have very few defenders today. The consensus is overwhelmingly that the movement was naive and perhaps even counterproductive of the values it was supposed to foster.

The growth of transnational legal practice derives largely from the export of the same model of the legal professional that was exalted in the law and development era—"a first-rate metropolitan lawyer."⁴² The rhetoric of democracy, development, and equality has vanished and the model of the lawyer it encompassed is no longer promoted by foreign aid. Now it comes via the market or even, as in the P.R.C. and Oman, through the encouragement of host governments. Nevertheless, the economic ideal is essentially the same as it was in the 1960s, though it has been shorn of any hints of redistributive goals.

The arrival of the first-rate metropolitan lawyer to promote international business involves a few trade-offs. As a recent observer noted, "one of the great dilemmas facing the developing countries centers upon how to reconcile the freedom of transnational trade and commerce with the strongly perceived need to regulate the terms and conditions under which such trade and commerce take place in order to redress the unfavorable imbalance in their economic development and in the standard of living of their people."⁴³ In other words, countries,

39. See *supra* note 12. "Most of the literature on modernization written during the 1960s and early 1970s took for granted that law and lawyers were essential to economic development. . . ." Abel, *supra* note 15, at 887.

40. Trubek & Galanter, *supra* note 12, at 1076.

41. See, e.g., J. GARDNER, *supra* note 12.

42. *Id.* at 37 (quoting William O. Douglas).

43. Wilner, *supra* note 34, at 288.

particularly developing countries, must reconcile national plans and priorities with the need to participate, lawyers and all, in the international market.

In addition to setting the values of world free trade against domestic priorities, the ideology of transnational practice involves at least two other issues. First, the decision to give a central role to lawyers in international business means that law itself will assume added importance in business transactions, even as lawyers strive to avoid regulation. A recent study of Japanese corporations in the United States emphasizes that "the differences between Japan and the U.S. with regard to the role of law in business is significant enough to make adaptations to the U.S. legal environment a challenging task for U.S. subsidiaries of Japanese corporations."⁴⁴ Japanese businessmen have complained that U.S. lawyers place the idea of "sticking to the rules" above loyalty to business goals.⁴⁵ Even efforts to avoid regulations must take rules into account.

Moreover, legality, according to the ideal described above, brings an individualist bias that may impede some social choices.⁴⁶ The Bhopal litigation, for example, focuses on individual rights to compensation rather than social choices about the appropriate price for fertilizer and the degree to which individuals should bear the consequences of risks in order to develop technology in India.

At this point we can see that the model of professional ideology underlying the practice of the transnational lawyer, for all its appeal, depends on several ideals that are not universally shared. Transnational legal practice patterned on the first-rate metropolitan lawyer promotes an economic internationalism that may conflict with the domestic priorities of both developing and developed countries; fosters a greater use of law in business; and encourages individualism consistent with Western traditions. How should thoughtful transnational lawyers confront the dilemmas raised by these concerns? Are there any ethical problems, for example, in avoiding regulations, especially when such tactics "subvert" the policies of one's own country; in taking advantage of the weakness of a developing country; or in introducing western values of individualism and legality through the seemingly neutral ideal of providing effective legal services?

In order to learn what we can from lawyers' introspection about their work and the ideology that supports it, we can turn to the recent literature on the ethics of the transnational lawyer. Roger J. Goebel of Coudert Brothers sees few problems

44. S. Miyazawa, Professionalization of Legal Departments of Japanese Corporations in the U.S.: Organizational Adaptation to Multiple Environments 3 (unpublished paper prepared for the 1985 Annual Meeting of the Law and Society Association, San Diego, California, June 6-9, 1985) (copy on file, Michigan Yearbook of International Legal Studies).

45. *Id.* at 30-31.

46. Abel, *supra* note 15, at 886. ("In the Third World, and especially in Latin America, expansion of the planned economy instead has reduced the role of lawyers. . . . Private lawyers become mere reactive obstructionists who invoke legalism to thwart government action. . . ." *Id.*).

in the transnational aspects of practice.⁴⁷ The lawyer provides the usual representation to the client and the questions articulated above simply do not arise. That does not mean, however, that there are no limits to representation in the transnational setting, nor that the transnational dimension is never relevant to the definition of the role of the lawyer.

Noting that Rule 4.3 of the Model Rules of Professional Conduct prohibits legal assistance in fraudulent, illegal, or unconscionable transactions, Goebel states that it "represents an appeal to the American international lawyer to exercise his conscience more frequently."⁴⁸ This rule thus might be used to permit an international lawyer to back out of a transaction that seems to take advantage of a developing country. Goebel's examples, however, suggest that such a liberal use is not to be expected, especially since it would make it rather difficult to retain clients.

As regards the professional role, Goebel suggests that while lawyers generally are expected to promote legality, they may, in certain instances, ignore a corrupt and unjust regime's laws. Thus he finds efforts to avoid "repressive" foreign laws of "regimes fairly universally criticized for human rights violations" acceptable.⁴⁹ Although he leaves the individual lawyer to decide which regimes fit that criterion, Goebel's analysis permits some consideration of the character of particular national regimes. Similarly, in another example involving the sale of chemicals banned in the United States to third world countries, Goebel's recommendation goes only a small step in the direction of affirming the lawyer's responsibility. He suggests that the lawyer need only ensure that the buyer is aware of the risks: "[s]o long as the lawyer is of the opinion that the risks have been considered by the buyer, there is no reason not to assist the buyer in the transaction."⁵⁰

The lawyer may have a greater responsibility in the sale of arms: "Probably few international lawyers would find it ethically improper (though some might find it repugnant) to assist a client in the sale of riot control equipment to a democratic state, or even to an authoritarian one which is an ally and is not repressive."⁵¹ This is Goebel's only example in which the nationality of the lawyer is in any way relevant to his or her involvement in a transaction. Thus, while it may make some difference that the arms purchaser is an ally or an adversary of the lawyer's own country, national interests generally are simply beside the point.

According to Goebel, lawyers—transnational and otherwise—are supposed to be independent of such concerns and free of such responsibilities. His discussion of legal ethics in the business setting thus avoids the more difficult problems that

47. See Goebel, *Professional Responsibility Issues in International Law Practice*, 29 AM. J. COMP. L. 1 (1981).

48. *Id.* at 26.

49. *Id.* at 44–45.

50. *Id.* at 56.

51. *Id.* at 56–57.

a transnational practice generates. Without going too deeply into the subtle ideologies of internationalism and legality, we can focus on the belief that transnational lawyers are independent of their clients and the political implications of their client's activities.

Despite an ideology that emphasizes world efficiency through trade among businesses and nations, it is not easy to disclaim all responsibility for the activities of one's clients; particularly when those clients are foreign countries or entities organized to serve the interests of foreign countries. Recent press accounts of lawyers representing Libya and Nicaragua illustrate that lawyers are somewhat divided about the propriety of representing clients whose interests are deemed adverse to those of the United States. According to an article in the *American Lawyer*, U.S. lawyers representing Libya maintain a low profile while contending that they have been involved only in "strictly substantive legal issues."⁵² Other lawyers, quoted in the article, condemn that representation. Furthermore, at least one aspect of the representation, the effort to procure permission to build a Libyan mission in Manhattan over the opposition of New York officials, appears to go well beyond whatever "substantive legal issues" might mean. A *National Law Journal* account of the U.S. lawyers representing Nicaragua points out that the decision by one of the lawyers to represent the country before the World Court "led to a major fight" within his firm which was only resolved when he took a leave to establish an independent firm.⁵³ His original firm had not objected "so long as [his] cases were commercial, not political."⁵⁴ But this seems an illusory distinction—facilitating trade with the Nicaraguan regime is certainly contrary to the interests supported by the Reagan Administration. In general such efforts to divide political work from "neutral" commercial lawyering have failed.⁵⁵ It takes a certain blindness to ignore the

52. See Bruck, *Libya's Low-Profile Lawyers*, *Am. Law.*, Feb. 1982, at 30, 31.

53. Lauter, *Playing Hardball for Nicaragua*, *Nat'l L.J.*, May 7, 1984, at 1, 30.

54. *Id.*

55. Discussions of how the Foreign Agent Registration Act of 1938 applies to lawyers illustrate the problems inherent in drawing a line between politics and mere business. According to a 1980 article:

The trade lawyers take pains to separate themselves from the political lawyers. . . . [but] the number of lawyers hired by foreign governments to perform amorphous image-type lobbying is increasing rapidly. And it seems that the more repressive the government, the more money it will spend to hire a high-profile Washington lawyer.

Klement, *Feds Target Foreign Agents*, *Nat'l L.J.*, Aug. 25, 1980, at 1, 10. In any case, it is not clear that even trade work is non-political. A lawyer trying to reduce trade restrictions against Japanese corporations, for example, has a tough time being non-political:

An important part of his job, he said, is enlightening the people who make the laws about the policy issues that have an impact on international trade.

"Politics is not really a good word for it; we try to lay out the issues that lie behind the technical aspects of the law," he said. "We want to set down the full implications of what is essentially a narrow legal issue to be sure it leads to a sensible result."

Pryor & Couric, *supra* note 38, at 28.

political ramifications of using legal ingenuity to maximize Libya's and Nicaragua's resources and freedom to operate. This kind of dilemma finds no resolution in Goebel's approach. While thoughtful, it stays within the generally accepted professional ideology.

A related point, applicable to businesses and governments alike, is that the transnational lawyer is in a position to exploit the disadvantaged. Goebel's hypothetical about selling drugs or pesticides banned in the United States to foreign countries raises the problem. His answer is that the lawyer's only responsibility is to ensure that the purchaser of the drugs or pesticides is aware of the potential risks.⁵⁶ However, if the buyer intends to turn around and sell the drug or pesticide for a profit, can we say that full disclosure insulates the lawyer from the consequences of a resulting disaster? A fair private transaction with disastrous effects undoubtedly will be linked to the lawyer's activities, especially if there were no institutions otherwise available to oversee the unscrupulous buyer.

Finally, we must recognize that the work of the transnational lawyer is not necessarily rooted in a general harmony of interests facilitated by creative lawyering. Clients, after all, want special treatment—they want special licenses, preferred statuses, and assistance in circumventing regulations perceived by a country to be in its national interest. If the world economic system were capable of assimilating that unrestrained advocacy for general global interests, lawyers might rest easier with their creative efforts. According to Gordon, the *thèse nobiliaire* of the elite lawyer at the turn of the century was that lawyers could perfect the system despite the aims of their clients, and despite the fact that the lawyers "seemed actually to be working for and bound by ethics of loyalty to one side only."⁵⁷ That belief offers little promise today in the domestic setting, and almost no one would bet on the imminent formation of a just and fair world politico-economic system capable of controlling abuses of power and position.

Lawyers, in short, have an increasingly difficult time remaining innocent of the acts of their clients. Legal talent has a political impact, and few believe anymore that the system is so just that a skilled lawyer cannot do positive harm. Transnational legal practice provides a setting that makes this point especially difficult to deny.

But how then do lawyers cope with the dilemma of working for clients capable of inflicting harm if they get their way? Gordon discovers three paths, each of which can still be found today: the ideal of craft; nostalgia for the older ideal of practice insulated from business and politics; and what he terms "institutionalized schizophrenia."⁵⁸ All three depend on dividing the private realm of work from the public realm of politics. Craft exalts work itself and closes the

56. Another such easy answer would be that "both sides must have lawyers who are knowledgeable and experienced in the field." *Id.*

57. See Gordon, *supra* note 26, at 99.

58. See Gordon, *supra* note 14, at 65.

legal mind to its implications. Nostalgia for true independence looks backward toward a much simpler life and tries to fit the present into that image. The lawyers working for Libya or Nicaragua who insist that they have non-political orientations, and the lawyers who traveled to Bhopal claiming altruistic motives reflect the first and second approaches.

The third approach is the most interesting. It neatly divides work and public service, while acknowledging that the work may undermine public values. The idea then is that it is "appropriate for lawyers in one role to do the utmost to undo their accomplishments in the other."⁵⁹ That insight about the profession is useful in order to reconcile transnational business practice with much of the effort by lawyers in the field of international human rights. The effort, however, is less to "undo" than to make the working system shaped by transnational legal practice more acceptable.

IV. TRANSNATIONAL LEGAL PRACTICE AND INTERNATIONAL HUMAN RIGHTS

Goebel's discussion of transnational legal ethics referred at crucial points to the notion of international human rights. The lawyer's actions in pursuit of a client's interests, according to Goebel, must not involve violations of accepted human rights. This line between acceptable and unacceptable behavior can theoretically be drawn according to the guidelines set forth in State Department reports on human rights abuses and similar sources.⁶⁰ However, to the extent that the line is ambiguous or seems to have been crossed, transnational business lawyers who adopt the human-rights standard may suffer from Gordon's "institutionalized schizophrenia." They may argue enthusiastically in some settings for the strengthening of machinery whose weakness implicates them in human-rights violations—for example, in the sale of hardware that could be used to round up political dissidents or goods that strengthen the South African apartheid system, and then, disconcertingly, assume a public-spirited role aimed at regulating the very behavior that their "private" role helped to foster.

The terrible conflicts of the schizophrenic position may be unnecessary, however. No one denies the problems faced by the lawyer who, through his or her client, sanctions violations of international human rights. But is it enough to try to avoid that unacceptable behavior? The ideology of international human rights offers an appealing alternative that needs to be explored. Lawyers uneasy about any aspect of their practice, even their clientele, may find the protection of international human rights an attractive outlet for their skills. Consistent with

59. *Id.*

60. Of course, such reports are hardly free from their own biases. The most recent State Department report is U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984 (1985).

"the finest traditions" of the bar, many transnational corporate lawyers are indeed heavily involved in legal efforts to stop disappearances, tortures, apartheid, and violations of such favored rights as freedom of speech and the press.⁶¹ In addition, by citing international standards incorporated into U.S. law,⁶² lawyers can show that such work is essentially "non-political," consistent with professional independence, and, by definition, not inconsistent with the interests of their clients. So much work remains to be done to implement these basic indicia of humanity that even the most energetic pro bono advocate can keep busy, building, in fact, on an international expertise originally developed in the business setting. This kind of effort seems to provide a solution, at the international level, for the ideological dilemmas that, according to Gordon, our elite legal profession has been unable to resolve.

In the terms used before, we can suggest that human-rights activity is consistent with the legal ideology of independence, a demand for the skills of a first-rate metropolitan lawyer, the fostering of increased world trade, and a comforting belief that there exists some potential "world justice" that goes beyond free trade. The hope seems to be that if there is enough of a commitment to international human rights, the general system under which lawyers have relatively free rein will become more legitimate.

But how well does this package of human rights and transnational business practice overcome the dilemmas of professional ideology and practice—dilemmas that have been magnified by transnational legal practice? Again let us recall the law and development movement, which aspired in its most articulate statements to resolve such dilemmas by exporting democracy, development, and equality. The current model, even at its best, refuses to engage in questions of developmental priorities and the importance of domestic regulation and social justice within countries.⁶³ The extremely narrow human-rights approach insulates

61.

While a wide variety of fields such as civil rights, environmentalism, and consumerism have become part of the institutional fabric of public interest law in this country, international human rights issues, most notably immigration topics, are becoming the new public interest frontier of the Eighties—with lawyers carrying their involvement into U.S. courts, international forums, and courts abroad.

Public Interest on a Global Scale, Pipeline, Fall 1984, at 4.

62. See, e.g., RESTATEMENT OF THE LAW (SECOND) OF FOREIGN RELATIONS OF THE UNITED STATES §§ 701, 702 (Tent. Draft No. 3, 1982).

63. There has been little evidence of any commitment to the more vague and program-oriented "rights" of the International Covenant on Economic, Social, and Cultural Rights. The current hostility of the United States toward these rights is reflected in speeches such as that of Jeane J. Kirkpatrick, "The Role of Human Rights in the United Nations," excerpted in U.S. DEP'T OF STATE, HUMAN RIGHTS AND FOREIGN POLICY 11 (1983). Indeed, as Professor Weissbrodt has demonstrated, the political dilemmas faced by the human rights lawyer cannot really be avoided even by an apparent focus only on uncontroversial human rights. Bad choices in tactics, for example, will affect many individuals besides the immediate litigants; thus the human rights lawyer should assume responsibil-

the lawyer from these questions, though also ought to be raised by everyday domestic practice. Returning to the problems of today's ethical lawyer, it appears that ethical requirements are seen to be fulfilled if the "human rights line" is not crossed.

Several justifications for this narrower focus can be asserted. The most obvious one would be that greater modesty today recognizes the intrusive and imperial aspects of the law-and-development approach. Founded on an American version of "liberal legalism," that approach provided only one model for development, and it suggested that U.S. legal values ought to take priority in any country regardless of indigenous traditions and ideals.

That is, of course, a fair criticism of law and development, but it applies with equal force to today's less self-consciously intrusive movement. Lawyers today also provide only one model for development, one that works to maximize world trade and minimize obstacles in domestic regulations whether or not any given country—including the United States—has different priorities and ideals for economic policy. The model that lawyers are promoting is a streamlined one, but it is a model—our currently preferred model—nevertheless. Leaders in many countries either accept tenets of this model or agree to play according to these rules for instrumental purposes.

The importation of first-rate metropolitan lawyers, once defended in rather remarkable terms that failed to comport with concrete accomplishments, is now accomplished without the pretense of equality and democracy. The reason for the change can be traced in the domestic politics of the United States. A lawyer in the 1960s could claim to be independent, non-political, and yet committed to such values as equality, democracy, and development. Most observers believed that the pursuit of these goals was a technical process, that a non-ideological consensus on these basic values existed, and that an articulated commitment to them was consistent with a lawyer's skills and role.⁶⁴

The attitude of the leaders of the American Bar Association toward the legal effort on behalf of the "War on Poverty" fits that model precisely, as did much of the public-interest-law movement in the United States. The model was in many

ity for avoiding such errors even if the traditional codes of professional responsibility do not seem to require it. Weissbrodt, *Ethical Problems of an International Human Rights Law Practice*, in *TRANSNATIONAL PRACTICE* 217.

An interesting commentary on the currently popular "non-political" approach can be found in a book by the former director of the British Section of Amnesty International. C. DESMOND, *PERSECUTION EAST AND WEST: HUMAN RIGHTS, POLITICAL PRISONERS AND AMNESTY* (1983). According to Desmond, Amnesty International can only take the very limited position of asking for tolerance of dissent rather than social change: "[I]f it were to move from pleading for tolerance to demanding rights, it would also have to modify, indeed abandon, its claims to being apolitical. This would destroy its whole *raison d'être*, which is to involve people who do not want to be political." *Id.* at 43.

64. See E. JOHNSON, *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* 39–70 (2d ed. 1978).

ways naive and it became increasingly untenable as the apparent "consensus" broke down when translated into programs. The naiveté was especially pronounced in the assumption that the legal role in the War on Poverty could be exported successfully to Latin America, Africa, and Asia. The events of the 1970s and 1980s disabused most lawyers, whether domestic or international practitioners, of any belief, or fantasy, that their skills and practice could be deployed non-politically to improve world social justice.

What remains is a fantasy of world trade facilitated by the protection of the core of international human rights. Looked at carefully, this combination does not solve the lawyer's dilemma, but it can generate enough activity to avoid self-doubt and endure as an essential "first step." The current focus on international human rights in the United States, however, will tend to become a maximum vision, not a first step. Ultimately, it will not solve the dilemma of the "responsibility" of lawyers for the unpleasant activities of their clients. Nor will it succeed in overcoming the notion that lawyers really are simply out to make money regardless of how their activities might affect other people or their own nations. But it does offer some promise, which has been seized by many involved in transnational legal practice.

Indeed, the fantasy may offer too much promise. The process of legal education in the United States, for many reasons connected to the historical ideals of the legal profession, tends to produce a certain number of persons who, one might say, pick up in one way or another the ideas that lead to institutionalized schizophrenia. The commitment to "equal justice" is probably the most notable example; another would be a commitment to improve the operation of the judicial system. A byproduct of the process of educating lawyers, therefore, has been a certain number of "legal do-gooders," who seek to accomplish social reform consistent with professional ideals. We have some places to put these do-gooders, but the range of "non-political" options has been shrinking in the United States with the increased politicization of areas of "public interest" law. Even legal aid for the poor is condemned by many as a vehicle for the radical left.⁶⁵ We might say this is not a negative trend, as it may finally force members of the legal profession to confront honestly the political or public dimension of the work that they do in their private professional roles. Thoughtful commentators, including Geoffrey Hazard, urge this argument.⁶⁶ But is this yet another comfortable fantasy?

The danger of the focus on international human rights is that it provides a "perfect" outlet for legal practitioners generally. If they cannot find a neutral

65. A recent attack on the whole range of public interest advocacy, the "rights industry," is found in R. MORGAN, *DISABLING AMERICA* (1984).

66. G. HAZARD JR., *ETHICS IN THE PRACTICE OF LAW* (1978). ("The fact is that the modern legal adviser is an actor in the situations in which he gives advice. And as such he is accountable." *Id.* at 151.).

issue for their legal benevolence in the United States, they can still find a position condemning torture and disappearances elsewhere. As we must export our production of goods to maintain our way of life and avoid disruptive crises, perhaps we need also to export some of our ideological production.

V. CONCLUSION

A reader could conclude that no problem has been demonstrated. Keep the world system relatively free of egregious violations of international human rights, foster free trade, and make regulation difficult—and everyone will be better off. We might even add that democracy may emerge from an authoritarian country that develops a middle class through free trade and competition. Lawyer-believers in the ideology of the One World favored by Wendell Willkie and many recent politicians can take comfort in the role of transnational lawyers.⁶⁷ Or at least they can take comfort if those lawyers can avoid being seen as money-hungry vultures willing to sell their services to anyone who can and will pay.

For the rest, however, the situation is more difficult. Legal strategies for exporting democracy and social justice have proved naive. And the ideology of international human rights retreats rather dramatically from any of the loftier goals proclaimed for the law-and-development movement. There is no way to avoid recognizing that transnational lawyers, in their work, commit themselves to avoiding domestic regulations and priorities that impede corporate freedom or even the activities of a rival government. They are implicated in a political project that they may or may not accept. That is the lawyer's dilemma generally. Transnational practice unmasks it because there can be no easy retreat to the "system" and because it raises questions of loyalty to one's own country.

67. W. WILLKIE, *ONE WORLD* (1943). Willkie's vision was of a world constructed in the image of the United States. For example, he saw the Middle East as "a vast, dry sponge, ready to soak up an infinite quantity and variety of goods and services." *Id.* at 29–30. He believed that U.S. "ideas and ideals" together with U.S. goods had served "to render obsolete and ineffective the old ways of life." *Id.* at 30.